



Consumer Federation of America



**Consumers
Union**

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American Antitrust Institute

October 31, 2003

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th St., SW
Washington DC 20554

Subject: Digital Broadcast Copy Protection, MB Docket No. 02-230

Dear Chairman Powell:

We are writing to express our strong exception to the assertions in the letter of October 29, 2003 from Mr. Jack Valenti of the MPAA to the Commission concerning the DTV “Plug& Play” proceeding. Mr. Valenti’s averments, if true, imply that the FCC has engaged in “rulemaking by stealth” by approving and giving a “first mover advantage” to the 5C content protection technologies without having first given interested parties and consumers adequate notice or opportunity to be heard on the merits of such a rule.

We are also dismayed that this misinterpretation of the Plug & Play Order—to make the 5C technologies the sole, first-mover content protection for programming delivered over cable and direct broadcast satellite—would in any way support the need for the immediate approval of the MPAA proposal in the Broadcast Flag proceeding, without allowing for adequate time for alternative technologies to compete head-to-head for inclusion as approved technologies.

As you are aware, the Plug & Play Order does not specify 5C (or any other) content protection technologies. Nor does it adopt final Rules for the approval of such technologies or the terms of the DFAST license, both of which are the subject of the Commission’s Second Further Notice of Proposed Rulemaking. What the order does do is to grant CableLabs discretion on an interim basis to approve certain technologies that satisfy the applicable compliance and robustness criteria. Any determination by CableLabs may be appealed by any interested party or by consumers to the Commission for de novo review, including, arguably, approval of 5C itself. This interim arrangement is a far cry from the *fait accompli* described in the MPAA letter.

Moreover, the Plug & Play proceeding is aimed primarily at *copy protection* for high-value programming, not internet redistribution, as the interim encoding rules make clear. Under the Broadcast Flag proposal, marked content may be freely copied. Given the analog hole (and other weaknesses of the 5C technologies), 5C is unlikely to be effective as an internet redistribution prevention mechanism for cable and DBS. This lack of efficacy should weigh heavily in your impending decision on the Broadcast Flag. The potential presence of an ineffective internet redistribution prevention mechanism applicable to cable and DBS provides little or no support for mandating the same ineffective internet redistribution mechanism for digital broadcasting.

The Commission should not be engaged in giving *any* technology a first-mover advantage where competition and consumer choice is feasible. If the temporary arrangements established in the Plug & Play Order turn out to have that result with respect to the 5C technologies, procedures exist to attenuate the anticompetitive effects of market tipping and consumer lock-in, and, potentially, to challenge the inclusion of 5C altogether. To argue that broadcasters must be given a "level playing field" vis-à-vis cable and DBS because of the possibility that such a temporary advantage under interim arrangements might inure to the benefit of 5C is mind-boggling. We urge the Commission to place the public interest ahead of all others, and not to react to an unfair advantage that may inadvertently and temporarily be enjoyed by one interested party in the cable and DBS modalities by enshrining that advantage in over-the-air broadcasting, as well.

There is very little to recommend against allowing all parties sufficient time to compete on the merits for consideration as an approved technology. Moreover, additional time will also allow the Commission to ensure that technologies that are approved do not include anti-competitive licensing terms. The interim rules for Plug & Play should carry no weight in the Commission's deliberations over how best to proceed with the details of any Broadcast Flag regulations.

Respectfully submitted,



Chris Murray, Legislative Counsel
Consumers Union

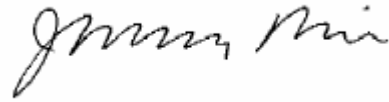


Mark Cooper, Dir. of Research
Consumer Federation of America

Ms. Marlene H. Dortch, Secretary
Re: MB Docket 02-230
October 31, 2003
Page 3

A handwritten signature in black ink that reads "Mike Godwin". The script is fluid and cursive, with the first name "Mike" being more prominent than the last name "Godwin".

Mike Godwin, Senior Technology Counsel
Public Knowledge

A handwritten signature in black ink that reads "Jonathan Rubin". The script is cursive and somewhat stylized, with the first name "Jonathan" being more prominent than the last name "Rubin".

Jonathan Rubin, Research Fellow
American Antitrust Institute

cc: Commissioner Kathleen Abernathy
Commissioner Jonathan Adelstein
Commissioner Michael Copps
Commissioner Kevin Martin
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